



FEDERAL ELECTION COMMISSION
Washington, DC 20463

George Freeman, Esq.
The New York Times Company
Legal Department
620 Eighth Avenue
New York, NY 10018

APR 29 2009

RE: MUR 5939

Dear Mr. Freeman:

On September 20, 2007, the Federal Election Commission notified The New York Times Company of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On April 2, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe the New York Times Company violated 2 U.S.C. § 441b(a). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Allen".

Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

4
5 **MUR 5939**

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7 **Respondent: The New York Times Company**

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9 **I. INTRODUCTION**

10 The complaint in this matter by David A. Keene alleges that The New York Times
11 Company ("The Times") made a corporate contribution to MoveOn.org Political Action
12 ("MOPA"), a non-connected multicandidate committee, in connection with the rate The Times
13 charged for a full-page advertisement. The complaint alleges that MOPA paid \$65,000 for its
14 advertisement, far below The Times' typical charge of either \$167,000 or \$181,692 for full-page
15 advertisements. The complaint concludes that this discount constitutes a corporate contribution
16 from The Times to MOPA in violation of 2 U.S.C. § 441b.¹

17 Based on available information discussed below, including information provided by The
18 Times, the Commission has determined that there is no reason to believe The Times violated the
19 Federal Election Campaign Act of 1971, as amended, ("the Act") in this matter.

20 **II. FACTUAL AND LEGAL ANALYSIS**

21 **A. Background**

22 On Friday, September 7, 2007, MOPA contacted The Times regarding running an
23 advertisement on Monday, September 10. The Times agreed to run MOPA's advertisement on
24 that date and the parties agreed to a price of \$64,575. On September 10, The Times published

¹ The complaint further alleges that the amount of this discount constitutes an excessive contribution from The Times to MOPA. Because corporate contributions are generally prohibited and therefore not subject to specific limitation, the Commission addresses this matter as an alleged corporate contribution and not as an alleged excessive contribution. See 2 U.S.C. §§ 441b(a) and 441a(a).

1 the advertisement, titled "General Petraeus Or General Betray Us? Cooking the books for the
2 White House." The advertisement contained a disclaimer, "Paid for by MoveOn.org Political
3 Action, political.moveon.org, not authorized by any candidate or candidate's committee."
4 MOPA's advertisement spawned public discussion of its content and criticism of The Times for
5 allegedly reducing its normal advertising rate for MOPA. *See* Charles Hurt, *Times Gives Lefties*
6 *a Hefty Discount for 'Betray Us' Ad*, NEW YORK POST, September 13, 2007; Claudia Parsons,
7 *MoveOn got timely break on ad rate*, WASHINGTON TIMES, September 14, 2007 (attached to the
8 complaint as Exhibits C and D, respectively).

9 On September 14, 2007, the complaint in this matter was filed with the Commission.

10 Later, on September 23, 2007, The Times published an article by Clark Hoyt, The Times'
11 Public Editor,² in which he questioned the MOPA advertisement's content and stated that MOPA
12 should not have been charged the "standby" rate of \$64,575. Clark Hoyt, *Betraying Its Own Best*
13 *Interests*, THE NEW YORK TIMES, September 23, 2007. Hoyt described this rate as available to
14 advertisers who are not guaranteed what day their advertisement will appear, only that it will be
15 in The Times within seven days. According to Hoyt, because The Times agreed to run MOPA's
16 advertisement on a specific day, Monday, September 10, 2007, The Times should have charged
17 MOPA a higher rate of \$142,083. Hoyt quoted Catherine Mathis, vice president of corporate
18 communications for The Times, as acknowledging "[w]e made a mistake," in that The Times'
19 advertising representative failed to make it clear to MOPA that for the \$64,575 rate, The Times
20 could not guarantee the Monday, September 10 placement; the representative, however, left

² Hoyt's article describes The Times' Public Editor as serving "as the readers' representative. His opinions and conclusions are his own."

1 MOPA with the understanding that the advertisement would in fact run that day.³ On the same
2 day as the Hoyt article appeared in The Times, MOPA announced that it would pay \$142,083 for
3 its advertisement, and the committee did so the following day, September 24, 2007.

4 **B. Analysis**

5 The Act prohibits corporations such as The Times from making contributions in
6 connection with Federal elections,⁴ and prohibits political committees such as MOPA from
7 knowingly accepting or receiving such contributions. 2 U.S.C. § 441b(a). The term
8 “contribution” includes giving “anything of value” for the purpose of influencing any election for
9 Federal office. 2 U.S.C. §§ 431(8)(A) and 441b(b)(2). The term “anything of value” includes all
10 in-kind contributions. 11 C.F.R. § 100.52(d)(1).

11 The provision of goods or services at less than the usual and normal charge for such
12 goods or services is a contribution.⁵ *Id.* The Commission’s regulations include “advertising
13 services” as an example of such goods and services. *Id.* If goods or services are provided at less
14 than the usual and normal charge, the amount of the in-kind contribution is the difference
15 between the usual and normal charge for the goods or services at the time of the contribution and
16 the amount charged the political committee. *Id.* For the purposes of this provision, “usual and
17 normal charge” for goods means the price of those goods in the market from which they
18 ordinarily would have been purchased at the time of the contribution. 11 C.F.R. § 100.52(d)(2).

³ Previously, The Times had reportedly defended its arrangement with MOPA regarding the cost of the advertisement. *See, e.g., Emily Cadel, MoveOn Ad Flap Likely to Be Replicated – On Both Sides – Through 2008, CQ POLITICS.COM, September 19, 2007.*

⁴ The Times is a corporation organized under the laws of the State of New York.

⁵ A number of exemptions to this rule are set forth in 11 CFR Part 100, Subpart C, none of which are applicable here.

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1 The issue of vendor discounts to political committees has been addressed by the
2 Commission in a number of Advisory Opinions. In these AOs, the Commission has permitted a
3 vendor to provide a discount to a political committee so long as the discount is made available in
4 the ordinary course of business and on the same terms and conditions to other customers that are
5 not political committees or organizations. *See, e.g.*, AOs 2006-1 (PAC for a Change); 1995-46
6 (D'Amato); 1994-10 (Franklin National Bank).

7 Accordingly, this matter turns on whether the price paid for the MOPA advertisement fell
8 below The Times' usual and normal charge for that kind of advertisement. *See* 11 C.F.R.
9 § 100.52(d). The available information indicates that the appropriate charge turns on the
10 understanding between The Times and MOPA regarding the placement of the advertisement. A
11 large difference in price depends on whether the parties agreed that the advertisement would run
12 on a certain date, an "open" arrangement, or whether the advertisement was not guaranteed to run
13 on a particular day but would run at some point during the next week, a "standby" arrangement.

14 The Times in its response denies making any corporate contribution to MOPA, and
15 defends the original \$64,575 price for the advertisement initially agreed upon by The Times and
16 MOPA as the result of a routine advertising sales transaction.⁶ The Times resp. at 1, 2. In the
17 wake of The Times' own public acknowledgment that the circumstances of MOPA's

⁶ The Times argues that its advertising rates are based on a complex web of factors, including negotiation with the buyer; in fact, most newspaper advertising is priced beneath the higher "open rate" cited in the complaint. The Times resp. at 5 and 8. Indeed, The Times provided copies of e-mail messages involving a MOPA representative and various Times' advertising department employees that purportedly show the negotiation regarding MOPA's advertisement. *Id.* at Exh. A.

1 advertisement warranted the higher rate of \$142,083, MOPA paid the higher figure.⁷ In light of
2 MOPA's payment of this amount within two weeks of the date on which the advertisement ran,
3 The Times argues that any possible violation, which The Times denies, has been remedied, and
4 "this cure has made the matter moot." *Id.* at 3.

5 The available information suggests that the \$64,575 rate initially agreed upon by MOPA
6 and The Times was less than the usual and normal price of \$142,083 for an advertisement
7 guaranteed to run on a particular day.⁸ The difference between these two figures, \$77,508, would
8 have constituted a corporate contribution from The Times to MOPA if MOPA had not paid the
9 higher rate of \$142,083 on September 24, 2007.⁹ See 2 U.S.C. § 441b(a); 11 C.F.R. § 100.52(d).
10 Thus, MOPA appears to have paid the usual and normal rate for its advertisement. See 11 C.F.R.
11 § 100.52(d).

12 Indeed, MOPA's payment, approximately two weeks after the advertisement ran, also
13 appears to be timely. Available information suggests that because the negotiations with The
14 Times were made through its media vendor, Fenton Communications ("Fenton"), an established

⁷ The Times defends this rate as well, which it explains by starting at the applicable \$181,692 open rate cited in the complaint, then subtracting 8% for the standard full-page discount, and subtracting another 15% for the advertising agency commission, leaving an applicable rate of \$142,083. The Times resp. at 9.

⁸ The Times' website confirms the 8% full-page discount and 15% advertising agency commission discount that The Times references in its response, resulting in the \$142,083 open rate for a full-page advertisement. See <http://www.nytimes.whites.net/mediakit>.

⁹ MOPA disclosed a payment of \$165,717.56 on that date to Zimmerman & Markman, Inc. for a "Newspaper [sic] Ad" on its 2007 Year End Report. Available information confirms that Zimmerman & Markman is a media vendor for MOPA and that this amount covers the \$142,083 rate for MOPA's advertisement in The Times plus production costs and markup.

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1 customer of The Times, no advance payment was required for the advertisement.¹⁰ According to
2 the available information, Fenton is normally invoiced by The Times on a monthly basis, with
3 payment due 15 days thereafter; Fenton bills the advertiser and then pays The Times.¹¹

4 It thus appears that The Times extended credit to MOPA in the ordinary course of
5 business and, notwithstanding the initial confusion as to the pricing, MOPA paid for its
6 advertisement in a timely manner. See 11 C.F.R. §§ 100.55 (the extension of credit by any
7 person is a contribution unless the credit is extended in the ordinary course) and 116.3(b) (a
8 corporation in its capacity as a commercial vendor may extend credit to a political committee
9 provided that the credit is extended in the ordinary course of business and on terms substantially
10 similar to nonpolitical debtors that are of similar risk and size of obligation). In sum, based on
11 the available information, the Commission finds no reason to believe that The New York Times
12 Company violated 2 U.S.C. § 441b(a) in this matter.

¹⁰ The Times' website page regarding "Credit and Payment Terms" states in part:

Advertisements must be paid for prior to publication deadline unless credit has been established by the advertiser and/or agency with The Times.

...

Advertisers and agencies granted credit will be billed weekly or monthly for published advertisements, as is determined by the category of advertising and established credit terms. Payment is due 15 days after the invoice date.

<http://www.nytimes.whites.net/mediakit>

¹¹ On this occasion, however, MOPA requested an invoice from The Times in advance of Fenton's usual payment process. The Times provided an invoice for \$64,575, and MOPA proceeded to request a second invoice, for \$142,083, which The Times also provided. MOPA paid The Times \$142,083 on September 24, 2007.

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